IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs February 20, 2008

STATE OF TENNESSEE v. CHARLES JOHNSON

Direct Appeal from the Circuit Court for Franklin County
No. 16739 Buddy D. Perry, Judge

No. M2007-01406-CCA-R3-CD - Filed April 25, 2008

The appellant, Charles Johnson, pled guilty in the Franklin County Circuit Court to two counts of sexual battery by an authority figure and agreed to concurrent six-year sentences with the manner of service to be determined by the trial court. After a sentencing hearing, the trial court ordered the appellant to serve the sentences in confinement. On appeal, the appellant contends that the trial court erred by denying his request for alternative sentencing. Based upon the record and the parties' briefs, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court are Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which DAVID G. HAYES and JOHN EVERETT WILLIAMS, JJ., joined.

Robert S. Peters and Norris A. Kessler, Winchester, Tennessee, for the appellant, Charles Johnson.

Robert E. Cooper, Jr., Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; James Michael Taylor, District Attorney General; and William Bobo Copeland, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

The record reflects that the appellant was indicted for six counts of rape of a child, a Class A felony; one count of rape, a Class B felony; six counts of aggravated sexual battery, a Class B felony; one count of sexual battery by an authority figure, a Class C felony; and one count of sexual battery, a Class E felony, for acts perpetrated against his step-granddaughter. The appellant pled guilty to two counts of sexual battery by an authority figure and agreed to an effective six-year sentence. We know nothing about the facts surrounding the two offenses that resulted in the guilty pleas because the appellant failed to include the guilty plea hearing transcript in the appellate record. The presentence report also fails to recite any facts surrounding the offenses.

At the appellant's sentencing hearing, the then fifteen-year-old victim testified that the appellant was married to her grandmother and began abusing her when she was three years old. The State asked the victim to describe the abuse, "not including what [the appellant] pled guilty to. We know what happened in those." The victim said that she used to stay at her grandmother's house and that the appellant "would try to touch me and bother me." In 1998, the victim was shopping with her grandmother at a Parisians store in Huntsville. The victim got tired, went outside to the car, and got in the backseat. The appellant also got into the car and sat in the driver's seat. He turned around and touched the victim's breasts and between her legs. In 1999, when the victim was in the first grade, she went on a trip to Nashville or Murfreesboro with her grandmother and the appellant. The victim went to the swimming pool, and when she returned to the hotel room, the appellant kissed her, touched her breast, and "finger[ed]" her vagina. Sometime in 2001, the appellant and the victim's grandmother were at the victim's house. The appellant came into the victim's bedroom, pushed her panties aside, and rubbed his nose in her vagina. When he left the bedroom, the victim's grandmother asked him, "What's wrong with your nose?" The appellant told her that he ran into a wall.

The victim testified that in September 2001, she was at an election office where her grandmother worked. The victim's grandmother telephoned the appellant and asked him to come pick up the victim, and the appellant drove the victim to her grandmother's house. When the victim and the appellant arrived, the victim watched television and changed into one of her grandmother's nightgowns. While she was lying at the foot of the bed, the appellant came into the room, lifted her gown, pulled down her panties, and raped her with his penis. The victim testified that the appellant first raped her when she was in the fourth grade "and it just kept going from there." The appellant also forced the victim to watch pornographic videos and look at cards with naked women printed on them. On May 12, 2005, the victim's grandmother took her to buy a prom dress. When they returned to her grandmother's house, the victim put her dress on the bed. The appellant came into the room, pushed her onto the bed, and raped her. One Thanksgiving while the victim's relatives were at her grandmother's house, the victim's grandmother sent her outside to get something out of the freezer. While the victim was bent over the freezer, the appellant grabbed her buttocks. Sometime in 2003, the appellant grabbed the victim's buttocks again while she was bent over the freezer.

The victim testified that at some point, her grandmother tried to get custody of her. However, "something" happened to the victim every time she went to her grandmother's house, so she told the judge that she wanted to live with her mother. She said that she had received some counseling but needed more and that she wanted to be a veterinarian and practice massage therapy on animals. After her testimony, the victim read a written statement to the appellant. She told the appellant that what he had done made her feel "nasty inside" and worthless. She said that she replayed over and over in her head the bad things he had done to her and that she did not hate the appellant but felt sorry for him.

Donald Ray Gardner, the Pastor of Oak Lawn Baptist Church, testified for the appellant that he had known the appellant for about twenty years and that the appellant had been a member of the church for most of that time. He said that the appellant attended church regularly and that the appellant seemed to be a Christian man. On cross-examination, Pastor Gardner testified that he did not know what happened in the appellant's home and had never talked with the appellant about the appellant's abusing the victim. He acknowledged that he did not know much about the appellant.

The State introduced the appellant's presentence report into evidence. According to the report, the then eighty-year-old appellant had been married to the victim's grandmother for the past twenty-three years. The appellant had two prior marriages and two children with his first wife. The report shows that the appellant served in the Navy from 1944 to 1946, was honorably discharged, and obtained his GED. The report states that he worked as an electrician for Aro, Inc. and Claspan at Arnold Air Force Base from 1952 to 1987, when he retired. The appellant reported that he suffered from high blood pressure, lower back pain, constipation, high cholesterol, and allergies and that he took various medications for his ailments. He also reported that he had triple bypass heart surgery in 1989 and that he had never abused alcohol or drugs. The appellant has no prior convictions. In a written statement the appellant provided for the presentence report, he said that the victim was lying, spoiled, and mad at him for making her behave. He also said that the victim and her mother "have it in for" him and that he only pled guilty because his lawyers told him the jury would "believe the girl, everytime."

The appellant's psychosexual report was also introduced into evidence. During the evaluation underlying the report, the appellant indicated that the victim exposed herself to him on at least three occasions while he was sitting and relaxing. The appellant maintained that he had never touched or sexually assaulted the victim. A questionnaire administered to the appellant for the evaluation indicated he was justifying or excusing his behaviors. However, the test also suggested that the appellant was possibly a good candidate for treatment and that he was "to some degree, . . . making positive steps toward dealing with issues in his life." The report noted that the appellant had positive social relationships in his community, had a history of following rules and regulations, and did not have a significant level of deviant thinking. Testing to estimate recidivism showed that the appellant was at a low to moderate risk "for impulsive and possible sexual medial offenses in the future."

The trial court noted that because the appellant's convictions were C felonies, it was required to consider alternative sentencing. However, the trial court decided to deny alternative sentencing in order to avoid depreciating the seriousness of the offenses. The trial court stated that the victim's testimony established "a significant pattern of abuse" that started when the victim was young and continued until the victim "got big enough to defend for herself." The trial court concluded that no child should have to go through what the victim went through and that "the system has an obligation to her." It ordered the appellant to serve his sentences in confinement.

II. Analysis

The appellant contends that the trial court erred by denying alternative sentencing because his age and medical condition result in his having "special needs beyond what the ordinary defendant would have." He also contends he should have received an alternative sentence because his psychosexual evaluation shows that he has no risk factors for recidivism and because he has a lengthy employment history, no criminal record, and a supportive home-life. He contends that given his minimal risk to reoffend, a community-based alternative to confinement, along with supervision, would reduce or eliminate completely any possible danger to the community. The State contends that the trial court properly denied alternative sentencing. We agree with the State.

Appellate review of the length, range, or manner of service of a sentence is de novo. See Tenn. Code Ann. § 40-35-401(d). In conducting our de novo review, this court considers the following factors: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on enhancement and mitigating factors; (6) any statement by the appellant in his own behalf; and (7) the potential for rehabilitation or treatment. See Tenn. Code Ann. §§ 40-35-102, -103, -210; see also State v. Ashby, 823 S.W.2d 166, 168 (Tenn. 1991). The burden is on the appellant to demonstrate the impropriety of his sentence. See Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments.

An appellant is eligible for alternative sentencing if the sentence actually imposed is eight years or less. See Tenn. Code Ann. § 40-35-303(a) (2003).[1] Moreover, an appellant who is an especially mitigated or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing. See Tenn. Code Ann. § 40-35-102(6) (2003). In the instant case, the appellant is a Range I, standard offender convicted of Class C felonies; therefore, he is presumed to be a favorable candidate for alternative sentencing. However, this presumption may be rebutted by "[e]vidence to the contrary." State v. Zeolia, 928 S.W.2d 457, 461 (Tenn. Crim. App. 1996). The following sentencing considerations, set forth in Tennessee Code Annotated section 40-35-103(1), may constitute "evidence to the contrary":

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
>
> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or

[1] Effective June 7, 2005, the legislature amended several provisions of the Criminal Sentencing Reform Act of 1989. However, the indictments for counts 3 and 5, the indictments to which the appellant pled guilty, allege that he committed those crimes before June 7, 2005, and nothing in the record indicates that he elected "to be sentenced under the provisions of the act by executing a waiver of his ex post facto protections." Tenn. Code Ann. § 40-35-114, Compiler's Notes. Therefore, the 2005 amendments do not affect the appellant's case, and we have cited the statutes that were in effect at the time the appellant committed the offenses.

(C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

Zeolia, 928 S.W.2d at 461. Additionally, the principles of sentencing reflect that the sentence should be no greater than that deserved for the offense committed and should be the least severe measure necessary to achieve the purposes for which the sentence was imposed. See Tenn. Code Ann. § 40-35-103(2), (4). Further, the "potential or lack of potential for the rehabilitation or treatment of the defendant should be considered in determining the sentence alternative or length of a term to be imposed." Tenn. Code Ann. § 40-35-103(5).

Once again, we note that the guilty plea hearing transcript was not included in the record for our review. An appellant carries the burden of ensuring that the record on appeal conveys a fair, accurate, and complete account of what transpired with respect to those issues that are the bases of appeal. See Tenn. R. App. P. 24(b); see also Thompson v. State, 958 S.W.2d 156, 172 (Tenn. Crim. App. 1997). The failure to include the transcript from the hearing, where the State presents the facts underlying the offenses, prohibits this court from conducting a full de novo review of the sentence under Tennessee Code Annotated section 40-35-210(b). "In the absence of an adequate record on appeal, this court must presume that the trial court's rulings were supported by sufficient evidence." State v. Oody, 823 S.W.2d 554, 559 (Tenn. Crim. App. 1991).

III. Conclusion

Based upon the record and the parties' briefs, we affirm the judgments of the trial court.

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NORMA McGEE OGLE, JUDGE